IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 29 OF 2004.

Mrs. Shila @Sudha Manjunath Vernekar,
Major of age,
Resident of Prashanti Niwas,
Pansulem, Canacona, Goa. .... Applicant
(Original Accused)

Versus

1. Mr. Rayaba S. Dessai,
Major of age,
resident of House No.1225,
Pansulem, Canacona, Goa.

2. State through Public Prosecutor. .... Respondents.

Shri S.D. Lotlikar, Senior Advocate with Ms. S. Naik, Advocate for the Applicant.

Shri Sudin Usgaoncar, Advocate for the Respondent No.1.

CORAM: N. A. BRITTO, J.

DATE: 27th January, 2005.

ORAL ORDER:

This revision petition is filed by the accused in C.C. No. 21/N/2002.

2. The Applicant (Accused, for short) was prosecuted by respondent No.1 (complainant, for short) in the said case under Section 138 of the Negotiable Instruments Act, 1881 (Act, for short).

3. The accused has been convicted by Judgment/Order of the learned

J.M.F.C., Canacona under Section 138 of the Act, which conviction has been upheld by the learned First Addl. Sessions Judge, Margao by his Order dated 25th October, 2004. The sentence imposed upon the accused has now been slightly modified, in that the accused is now required to undergo imprisonment until the rising of the Court and the accused is further required to pay compensation to the complainant in the sum of Rs.1,00,000/- under Section 357(3) of Cr.P.C. or in default to undergo S.I. for a period of one month.

4. The case of the complainant, in brief, was that the accused owed the complainant Rs.60,000/- and when the complainant demanded the said sum, the accused issued a cheque dated 26.4.02 for the said amount of Rs.60,000/- drawn on the State Bank of India, which when presented for encashment, in the Canacona branch of the State Bank of India was returned dishonored, for want of sufficient funds. The complainant therefore served a notice upon the accused which the accused received and replied, and, for want of compliance with the said notice, the complainant filed the said complaint, prosecuting the accused under S.138 of the Act.

5. The accused in the course of the proceedings took up several defences, one of them being that the said cheque was stolen by the wife of the complainant. The other was that when the accused was sick and when the family members of the accused were absent from the house, the said wife of the complainant took away the said cheque without the consent of the accused from her house with an illegal motive. It was also the case of the accused that the said cheque was lost. The learned J.M.F.C., Canacona rightly observed that

the accused had taken different pleas in her defence, but had not led any evidence to prove the same and therefore the accused had failed to rebut the presumption available to the complainant under S.139 of the Act. The learned J.M.F.C. observed, and in my view rightly, that if the cheque was stolen by Smt. Kamla Naik, wife of the complainant, then the accused would have at least filed a police complaint to that effect or brought the said fact to the notice of the Bank with a view to stop payment, and therefore the pleas taken in defence were baseless, false and unbelievable.

However, the accused was able to secure some admission on behalf of the complainant, in the course of his cross-ex, amination namely that " the amount of the cheque and the date and name was written by him. "

Taking advantage of the said statements or admissions on the part of the complainant in his evidence, Shri Lotlikar, the learned senior counsel has submitted that the cheque was written by the complainant himself and therefore the complainant cannot be termed to be the holder in due course. Shri Lotlikar next submits that it was incumbent upon the complainant to have shown independently that money was due to the complainant by the accused. Shri Lotlikar has also submitted that writing the other details of the cheque amounts to material alterations within the meaning of Section 87 of the Act. Shri Lotlikar has placed reliance on Section 20 of the Act and on the decisions reported in the case of **Avon Organics, Hyd. Ltd. Vs. Poineer Products Ltd. & ors. (2003 All MR (Cri) Journal 105)** as well as in the case of **Veera Exports v. T. Kalavathy [(2002) 1 S.C.C. 97]** .

6. On the other hand, Shri Usgaoncar, learned counsel of the complainant has submitted that Section 20 of the Act is not at all attracted in the case at hand and S.87 of the Act deals with material alterations and which is not the case at hand. Shri Usgaoncar has submitted that when a cheque is signed and delivered by the drawer without completing the same in other respects, the drawer gives to the holder of the cheque implicit authority to complete the said cheque in all respects and to present the same for payment and receive the payment due thereon. In support of his submission, Shri Usgaoncar has placed reliance on the case of **Lillykutty v. Lawrance (2003 (2) DCR 610)** .

7. Section 9 of the Act defines 'holder in due course' to mean a person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer or the payee or indorsee thereof, if payable to order, before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. Section 20 of the Act deals with inchoate stamped instruments, and, states that where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due

course for such amount: provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder. “.

8. Section 87 of the Act deals with the effect of material alteration and it provides that any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alterations and does not consent thereto, unless it was made in order to carry out the common intention of the original parties.

9. In the case of Avon Organics, Hyd. Ltd (supra) the accused had issued blank cheque without mentioning the date and the amount to the complainant and had sent it along with the letter stating that it could be presented after one month for payment, if he failed to pay the amount prior to 7.9.1997. He also requested fifteen days time on 22.8.1997 and thereafter the cheque was presented after filling up the blanks, but was dishonoured and thereafter notice of demand was sent which was received by the accused and a complaint invoking the provisions of Section 138 of the Act was filed. The learned Single Judge of A.P. High Court came to the conclusion that since at the time of issuing the cheque the amount payable under the cheque was not mentioned, and consent was not given for which the amount was being drawn it virtually amounted to alteration of the cheque which was not permissible and the act of the complainant in filling up the amount in words and figures and putting the date as per his own choice certainly amounted to a material alteration and therefore held that since the alteration was done without the consent of the

party who issued the cheque, the question of invoking section 138 of the Act did not arise.

10. In the case of Veera Exports (supra) the drawer of the cheque had changed the date of bounced cheque to a later date and the cheque had again bounced and then the payee had served a legal notice on the drawer and the drawer had replied to it stating that she had been forced to change the date against her will. The Supreme Court therefore held that the question whether the drawer was a willing party to the alteration of the date was a question of fact which had to be decided on the evidence.

11. In the case of Lillykutty v. Lawrance (supra) a Division Bench of the Kerala High Court relying on its earlier Division Bench Judgment in the case of **Bhaskaran Chandrasekharan v. Radhakrishnan (1998 (1) KLT 881)** held that when a cheque is issued for consideration and there is no dispute regarding signature, amount and name, it cannot be said that by putting a date on the cheque by the payee who is the holder of the cheque in due course would amount to material alteration rendering the instrument void. When a cheque is admittedly issued with blank date, and when the drawer has no objection with regard to he name, amount and signature, it can be presumed that there is an implied consent for putting the date as and when required by the payee and get it encashed unless the contrary is proved. The burden is entirely on the drawer of the cheque to establish that the payee had no authority to put the date and amount and then encash the cheque. There are instances where blank cheques are issued to the payee. If any amount is due to the payee from the drawer of

the cheque and that amount is shown in the cheque which is admittedly signed by the drawer, the presumption could be drawn that the cheque has been validly issued. An implied consent can be presumed in such a situation. Once a cheque is drawn by a person on an account maintained by the Bank and is returned with the endorsement 'funds insufficient', it amounts to dishonour within the meaning of S. 138 of the Negotiable Instruments Act. S.138 confirms the presumption provided under S.118(a) and 118(g) of the Act.

The Division Bench further held that :-

" No law provides in the case of cheques the entire body has to be written by the drawer only. What is material is the signature of the drawer and not the body of the instrument. Therefore when the drawer has issued the cheque whether the entire body was written by the drawer written beyond the instructions of the drawer, whether amount is due or not, those and such matters are defences which drawer has to raise and prove it. Therefore the mere fact that the payee's name and the amount shown in the cheque are in different handwriting is not a reason for not honouring the cheque by the Bank. Banks would normally see whether the instrument is that of the drawer and the cheque has been signed by the drawer himself. The burden is therefore entirely on the drawer of the cheque to establish that the date, amount and the payee's name are written by somebody else without the knowledge and consent of the drawer. In the instant case, the drawer of the cheque has not discharged that burden. Apart from the interested testimony of the drawer, no independent evidence was adduced to discharge the burden. "

12. In my view and as rightly submitted on behalf of the complainant Section 20 of the Act is not at all attracted to a cheque but the basic principle underlying S.20 of the Act could certainly be followed in case of cheques which are admittedly signed by the drawer of the same. 'I will give you a blank signed cheque' is an expression which was often heard even before the prosecutions under S.138 of the Act came to be lodged. The said expression signifies that the drawer gives authority to the holder or payee to complete the cheque in all respects including the amount to be filled in and the date and to present it for payment and obtain the payment due thereon. In the case at hand it was not at all the case of the accused that the amount and the date were filled in by the complainant without the consent of the accused. It is possible, nay probable that it is the complainant who wrote down the amount and the date at the request of the accused and then the accused signed the cheque and handed over the same to the complainant, to present it for payment. With the handing over of the said cheque, the complainant received the same with all presumptions available under the Act and it was for the accused to rebut the said presumption particularly the presumption available to the complainant under S.139 of the Act which the accused failed to rebut. In fact, when the notice of demand was sent by the complainant to the accused, the accused did not at all refer to either the cheque or the money which the accused had borrowed from the complainant, but on the contrary the accused sent a reply dated 17.5.02 stating that she could not disclose many of the things at that point of time and she would disclose them all in the Court when the complainant would file the complaint in Court. However, the fact remains that the accused led no evidence in support of the several pleas taken by her and

therefore both the Courts below were wholly justified in drawing the presumption available to the complainant under S.139 of the Act that the complainant had received the cheque in the discharge of debt which the accused owed to the complainant.

13. From the decisions cited on behalf of both the parties and referred to hereinabove, it appears that there is preponderance of judicial opinion in favour of the proposition that when a cheque is issued duly signed by the drawer and the holder completes the same in other respects namely as regards the amount due and the date, the presumption would still be available to the complainant/holder unless the accused shows that the said particulars were filled in without the consent of the accused/drawer. This position was referred to in the case of Avon Organics, Hyd. Ltd. (supra) by referring to the case of **P. Srinivasulu Vs. Nagaral Eraiah Shetty @ N. Chinna Eranna Setty and Sons (1994 (2) An. WR 225)** wherein the Court had observed thus :-

" The lower Court found that Ex.P-1 does not contain the ingredients of a valid cheque so as to attract the provisions of Section 139 of the Negotiable Instruments Act. In a case where a blank cheque has been issued, the issuance of which is not denied by the accused, even though it was asserted by him that it was not issued with any dishonest intention, the presumption under Section 139 of the Act can be drawn. The presumption under Section 139 is a rebuttal presumption, and the accused admitted the same and has not cross-examined the prosecution witnesses. Mere filling up of the figures in the cheque by the complainant will not be a ground for invalidating the cheque

and preventing the party from taking steps under Section 138 inserted by the Negotiable Instruments Laws (Amendment) Act, 1988 on the ground of insufficiency of funds. This Court has held that endorsement will not be a ground for throwing away the case under Section 138. "

14. The same view has been followed in the two decisions of the Division Benches of the Kerala High Court referred to hereinabove namely in the case of **Bhaskaran Chandrasekharan v. Radhakrishnan (1998 (1) KLT 881) and Malhotra Handlooms & Ors. v. Hari Om Yarns (P) Ltd. (2003 (2) DCR 616)**. In my view cases like this cannot be termed to be a case where there is a material alteration. Material alteration will presuppose a change of something which is there to something which was not there. In cases like this there is a tacit or implied consent by the drawer to fill in the details of the amount and date of the cheque. However, as already seen, as far as the facts of this case are concerned, it certainly could not be ruled out that the figures and the date of the cheque were first written by the complainant and then the accused signed the cheque and again handed it over to the complainant to recover the amount due thereon. Being so, I find there is no merit in this revision.

Consequently the revision petition is hereby dismissed.

N. A. BRITTO, J.

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